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Supreme Court of the United States

OCTOBER TERM, 1943

No. 351 RAY-ROB

CLARENCE H. RAYNO
(Petitioner & Defendant Below)

v.

UNITED STATES OF AMERICA
(Respondent and Plaintiff Below)

PETITION OF CLARENCE H. RAYNO FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No.

CLARENCE H. RAYNO, *Petitioner and Defendant Below*

v.

UNITED STATES OF AMERICA, *Respondent and Plaintiff Below*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioner, Clarence H. Rayno, by this petition for a writ of certiorari seeks the review of a judgment of the Circuit Court of Appeals for the First Circuit which vacated the judgment of the District Court and set aside the verdict in favor of the petitioner and remanded the case for further proceedings consistent with its opinion (R. 233, 242).

SUMMARY STATEMENT OF THE MATTER INVOLVED. The United States on September 28, 1939 filed in the United States District Court for the District of New Hampshire a petition for the condemnation of about twelve acres of land belonging to the petitioner, Clarence H. Rayno. The only issue on the pleadings was the damages to the petitioner occasioned by the taking of his land. (R. 2, 10). The damages were assessed by jury which returned a verdict in the sum of $12,725., on which judgment was entered. (R. 15, 24).

This petition for condemnation is based on 33 U. S. Code, Sect. 591 which authorizes the acquisition by condemnation of "any land, rights of way or material needed . . . to maintain, operate and prosecute works for the improvement of rivers and harbors for which provision has been made by law." The land

was condemned to provide "material needed" for the construction of a flood control reservoir on the Pemigewasset River authorized by the Flood Control Act approved June 22, 1936 (49 Stat. 1570) and the amendment thereto approved June 28, 1938. (52 Stat. 1215). The construction of this project was commenced by the War Department in August 1939. (R. 71). The dam was constructed of earth and is seventeen hundred feet long, one hundred thirty-five feet high and thirty-five feet wide at the top or crest. (R. 69). The area flowed by the dam is approximately two thousand nine hundred fifty acres. For such a dam a core and blankets of practically impervious material are necessary. (R. 69). The material for the core and blankets, consisting of about two hundred seventy-five thousand cubic yards of glacial till, was taken from the petitioner's land. (R. 74, 192, 203). The petitioner's land is about three and one-half miles from the dam and wholly outside the reservoir. (R. 78).

The evidence tended to prove that in 1936 the War Department commenced a geological survey of the lands within a radius of five miles of the dam, which was completed in 1938, to locate material suitable for the construction of the core and blankets of the dam. (R. 77, 78, 79, 80, 84). This survey or reconnaissance disclosed three deposits, of which the petitioner's deposit was the most suitable. (R. 82). The deposit consisted of a well graded glacial till "ranging from boulders down to clay sizes", (R. 77), and in density and weight comparable to cement concrete but "a little more pervious". (R. 78). The combination of clay and coarse material "when properly compacted produced a core quite impervious to water". (R. 192).

In the summer of 1939 the War Department released the specifications for the construction of the dam, which provided that the "borrow" for the core and blankets was to be taken from the Rayno land. (R. 71-2). A contract for the construction of the dam pursuant to the specifications was made in due course and the construction actually commenced early in August 1939.

There is much evidence to show the prevailing prices for "borrow" or material used for the construction of fills, embankments and other similar works. Borrow is divided into two classes, common and selected. The glacial till was classified as selected borrow. (R. 133-4, 140). Borrow is customarily

sold by the cubic yard at the deposit or borrow pit and excavated by the purchaser. (R. 99, 105, 122, 144). The evidence shows that prevailing prices for borrow varied from two to ten cents per cubic yard. (R. 105, 123, 141, 171, 202). The United States in selling borrow from the National Forest Reservation for highway construction charged from two to five cents per cubic yard. (R. 132, 135). The demand for glacial till in and around Franklin prior to the construction of the reservoir had been limited to highways and tennis courts and the prevailing price was five cents per cubic yard. (R. 99). The market value of the land was placed at $10,000 to $13,000 by the petitioner's witnesses. (R. 114, 123, 142).

The judgment was vacated and the verdict set aside because of the failure of the District Court to grant certain requests for instructions. The gist of the decision is stated in the opinion as follows:

> "In the requests the court was asked to charge the jury to the effect that the landowner was not entitled to recover any element of value arising from the prospect that the land would be taken by the Government; that the presence of the glacial till could not be considered unless there was a demand for the material by someone other than the Government; and that, there being no reasonable prospect of any market for the glacial till except the market created by the Government, the deposit should not be considered but the land should be valued as part of a farm.
>
> "From what we have already said with respect to the questions of evidence it is clear that these points, except the last one, should have been covered by the charge." (R. 241).

JURISDICTIONAL MATTERS. This petition for certiorari is based on 28 Judicial Code, Sec. 347 (a). The judgment of the Court of Appeals vacating the judgment and setting aside the verdict was entered as of June 14, 1943. The petitioner's motion for rehearing was denied on July 6th, 1943. (R. 242).

THE QUESTIONS PRESENTED. The Court of Appeals erred, –

1. In holding that the condemnor may not be considered as a potential purchaser in determining the market value of the petitioner's land at the time of taking. (R. 241).

2. In holding that the demand for borrow material for the construction of the project may not be considered in determing the value of petitioner's land. (R. 238-41).

3. In holding that petitioner's land was "within the scope of the project from the time the Government was committed to it". (R. 237-8).

REASONS FOR GRANTING THE PETITION. The Fifth Amendment to the Constitution of the United States provides that property shall not be taken "for public use without just compensation". This case presents important federal questions as to the rules and standards for determining just compensation.

1. The Court of Appeals in holding that the presence of glacial till could not be considered in determining the value of the petitioner's land "unless there was a demand for the material by someone other than the Government", effectively precluded the consideration of the condemnor as a potential purchaser. In effect this ruling holds that the War Department under no circumstances would have purchased this land by direct negotiation from the petitioner at a fair price. The War Department actually had authority either to purchase or to condemn the lands and material necessary for the construction of the project. The petitioner's land contained "borrow" highly suitable for the construction of the core and blankets of the dam. In negotiating for this land a prudent man in the position of the War Department would ordinarily make some allowance for the special adaptability of this material to the proposed use. But the question whether the presence of the condemnor in the market may be considered in assessing damages for the taking of land has not been authoritatively determined, although there are decisions indicating the probable rule.

2. The Court of Appeals also held that "the landowner was not entitled to recover any element of value arising from the prospect that the land would be taken by the Government." This rule also found expression in the proposition that "the market for hardpan created by the Government's activites at Franklin Falls cannot be considered in determining

the value of the land". These rulings, because the demand was created by the condemnor, deny to the petitioner the value of his land for the "highest and most profitable use" for which the property was adapted at the time of taking. *Olson v. United States*, 292 U. S. 255. In this respect the decision appears to be in conflict with *Ford Hydro-Electric Company v. Neely*, 13 F. (2d) 361 and *Medina Valley Irr. Co. v. Seekatz*, 237 Fed. 805 and other cases.

3. The Court of Appeals further held that the land was "within the scope of the project from the time the Government was committed to it". *United States v. Miller*, 317 U. S. 369. For this reason among others the Court held that the petitioner is not entitled to the value of his land at the time of taking. However, this parcel of land was not then and is not now within this flood control project. The glacial till or some similar material was needed for the project but not the petitioner's land. The land could now be sold without taking anything from the project. Furthermore, the plaintiff is entitled to the fair value of his land as borrow whether within or without the scope of the project. The value of the plaintiff's land results from the borrow and not from the taking by the United States. The rule invoked does not apply to petitioner's land. See, *United States v. Alcorn*, 80 F. (2d) 487.

This case presents important questions of law the authoritative determination of which is especially desirable because of the large number of condemnation cases now pending. These questions or certain of them seem to have been decided in conflict with the decisions of other Circuit Courts of Appeals. The United States before the Court of Appeals, contended that the questions herein raised are "of considerable importance to the Government". They also are of importance to land owners, for if the United States may in condemnation proceedings preclude the consideration of the value of the land for its "highest and most profitable use" because the use is that for which the lands are condemned, lands may be acquired for less than fair market value. Just compensation may be as effectively denied by rulings such as were made by the Court of Appeals in the present case as through actual confiscation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this

Honorable Court to the United States Circuit Court of Appeals for the First Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings of such Court in the case lately pending therein on its docket No. 3862 wherein the United States of America is plaintiff and appellant and the said Clarence H. Rayno is defendant and appellee and that the judgment therein may be reversed, and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

CLARENCE H. RAYNO,
By his attorney,

ROBERT W. UPTON,
Concord, New Hampshire.